COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 022690-12**

Cheryl Marcoux	Employee
Lawrence General Hospital	Employer
Lawrence General Hospital	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Koziol, and Long)

The case was heard by Administrative Judge Maher.

APPEARANCES
Michael A. Torrisi, Esq., for the employee
Maryann Calnan, Esq., for the self-insurer

HARPIN, J. The employee and the self-insurer appeal from a decision awarding the employee § 34 and § 35 benefits. We affirm.

The employee, Cheryl Marcoux, was a phlebotomist at the Lawrence General Hospital from 2009 to September 10, 2012. In this position she was required to be on her feet all day, either walking the halls of the hospital drawing blood from patients in their rooms, or waiting in the emergency room for the same purpose. (Dec. 5.) If the employee was assigned to the emergency room, she was required to cover the intensive care unit as well, which required that she constantly go up and down stairs. Id.

The employee suffered an industrial injury on September 10, 2012, when she fell at work, sustaining a right knee medial collateral ligament strain, a medial meniscus tear, and the subsequent development of osteoarthritis. (Dec. 4, 5.) She stayed out of work for a few days, then attempted to return to work, but left after only one day. Id. After an unsuccessful course of physical therapy the employee had a right knee arthroscopy on January 23, 2013, followed by yet another round of therapy. (Dec. 6.) She still had pain and discomfort, but was cleared to return

to modified work, which she attempted on June 23, 2013. Id. Despite not being required to perform rounds or climb stairs the employee walked with a limp, and was sent home due to the limp. She was then terminated. Id. Since that time the employee has had pain in the right knee, with feelings of grinding, crackling and popping. Id. Attempts to control the pain with medications and cortisone shots have been unsuccessful. Id.

The employee filed a claim for §§ 34, 13 and 30 benefits, which was conferenced before the judge. An order issued on November 7, 2013, awarding her those benefits from June 24, 2013 to November 6, 2013, followed by § 35 benefits from November 7, 2013 and continuing. (Dec. 2-3.)[1] Both parties appealed. (Dec. 3.) After considering the August 8, 2014, report and deposition testimony of the § 11A impartial physician, Dr. Mark P. Gilligan, the additional medical evidence of both parties that was submitted for the "gap" period up to August 8, 2014, and the testimony of the employee, the judge awarded the employee § 34 benefits from June 23, 2013 to August 8, 2014, and § 35 benefits from August 9, 2014 and continuing. (Dec. 12.) The judge found there "are few if any jobs the employee could perform," but because of her "limited experience doing bench assembly entry level work . . . earning state minimum wage would be the only option." (Dec. 6-7.) Based on that finding the judge found the employee had an earning capacity of $320.00 from August 9, 2014 to December 31, 2014, and an earning capacity of $360.00 from January 1, 2015 and continuing. Both parties filed timely appeals.

We affirm the decision, but find that the self-insurer's appeal raises an issue that requires discussion.

The self-insurer argues that the judge's finding of total incapacity from June 24, 2013 to August 8, 2014, was erroneous, as "the remainder of the

[1] The self-insurer accepted liability for the September 10, 2012, work injury and paid the employee §34 benefits from that date to her first attempt to return to work a few days later, and then to June 23, 2013, her second attempt at working. (Dec. 4.)

evidentiary record, both medical and non-medical, demonstrates a manifest capacity for work not only prior to the impartial examination, but also prior to the first date of the entire claimed period of incapacity." (Self-ins. br. 6.) It notes that the employee's treating physician, Dr. Steven J. Andriola, released the employee to full duty work on May 14, 2013, (Tr. 74, Ex. 6), and that the employee was seen by an investigator on May 30, 2013 and June 26, 2013, "performing many if not all of the activities contemplated in the restrictions later assigned by the impartial examiner." (Self-ins. br. 6.) "The whole of the surveillance obtained of the Employee revealed her to be consistently active for a period of one (1) month during the same period she alleged inability to return to work." (Self-ins. br. 6-7.) In short, the self-insurer argued that the medical and surveillance evidence did not support a finding of total incapacity for the period of June 24, 2013 to August 8, 2014, thereby rendering the award of total incapacity benefits for the period of a year after that surveillance, arbitrary and capricious. (Self-ins. br. 8.) We do not agree.

The judge adopted the "gap" medical opinion of Dr. Michael K. Ackland, who felt, on June 24, 2013 and October 11, 2013, that the employee was totally disabled, due to persistent pain in her right knee, pain that was exacerbated when using stairs, prolonged walking, lifting, pushing, pulling, squatting and sleeping. (Dec. 9; Ex. 5.) This the judge was well within his discretion to do, Warman v. Berkshire Community College, 31 Mass. Workers' Comp. Rep. 117, 126 (2017), citing Kent v. Town of Scituate, 27 Mass. Worker's Comp. Rep. 195, 199 (2013) (judge free to adopt all, part, or none of expert's opinions), as long as he did not mischaracterize the doctor's opinion, fail to consider the entire record, or adopt conflicting opinions. Noel v. Faulkner Hospital, 31 Mass. Workers' Comp. Rep. 139, 142 (2017). The judge did not adopt the opinion of Dr. Andriola that the employee was able to return to full duty work on May 14, 2013; thus that opinion cannot play any part in determining whether the judge's finding of total incapacity was proper.

In regard to the surveillance evidence, the judge noted he had seen the video of the employee using a lawn mower, lifting the mower, and on a different day, walking at a beach. His conclusion was: "I am in agreement with the Impartial Doctor's view that she had a limp while walking on the beach." (Dec. 6.)[2] Later in the decision the judge noted the video showed the employee was not housebound, but that, "she does limp and has some trouble getting around based on my view of the videos." (Dec. 10.) We have always held that video evidence of an employee's activity level is an adjunct to medical evidence, and that a judge may not rely on it to counter the opinion of a medical expert when the issue is the extent of disability. Jaho v. Sunrise Partition Systems Inc., 23 Mass. Workers' Comp. Rep. 185, 190 (2009) (error for judge to substitute conclusory assessment of video presentation of employee's activities for requisite medical opinion on employee's condition). See also, Wicklow v. Fresenius Medical Care Holdings, Inc., 31 Mass. Workers' Comp. Rep. __ (October 13, 2017) (where video was not viewed by doctor, judge erred in substituting her own disability opinion based on activities in video, for opinion expressed in medical evidence); Araujo v. United Walls Systems, LLC., 28 Mass. Workers' Comp. Rep. 229, 233 (2014) (judge erred in assuming impartial physician would have changed his disability opinion had he viewed surveillance video). However, in this case the judge merely accepted the video as evidence of the employee's mobility in May and June, 2013, as stated by the impartial physician, Dr. Gilligan, and found that it did not contradict the opinion of Dr. Ackland on June 24, 2013,[3] that the employee was totally disabled, apparently because the video showed limited movement, with the

[2] The impartial physician, after viewing the surveillance video at his deposition, stated: "[i]t does look like she does have a limp." (Dep. 16.)

[3] It must be remembered that the employee attempted to return to work on June 23, 2013, and was sent home because she was limping. (Dec. 6.) Dr. Ackland's total disability opinion followed the next day, in which he found she "ambulates with a mild antalgic gait." (Ex. 5.) The doctor repeated his total disability opinion in a later treatment note, dated October 11, 2013. Id. The judge's adoption of Dr. Ackland's disability opinions presumably was for both dates.

employee limping. As this was an acceptable usage of the video evidence, there was no error. We therefore affirm the decision.

So ordered.

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William C. Harpin
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: **April 18, 2018**